MICHIGAN LAW REVIEW

Vol. 30

MAY, 1932

No. 7

LIABILITY WITHOUT FAULT AND PROXIMATE CAUSE

*Fowler V. Harper**

I

VARIATIONS IN STATEMENT OF LIABILITY

AS a logical matter there seem to be two possible schemes of legal liability. The first one may be stated as follows: One may be liable for *all* consequences of *all* of his acts. While it has been suggested that this was the principle of the mediaeval law, it has been pointed out by Professor Winfield that such was never literally the case. Under this principle, as he has shown, everyone would be in jail except for these reasons: no one could legally put anyone else in jail, no one could legally keep anyone else in jail, and no one could legally build a jail in the first place.¹

The second scheme of liability — the one actually in force — may be stated in three ways: (1) one may be liable for *some* of the consequences of *all* of his acts, or (2) one may be liable for *all* the consequences of *some* of his acts, or (3) one may be liable for *some* of the consequences of *some* of his acts. Now these three statements are in fact three different statements of the same thing. To state that one is liable for some consequences of all acts, for all consequences of some acts, or for some consequences of some acts is merely repeating the same proposition in three different ways. As a practical matter, the common law principle is generally stated in the third way, and the problem in every case is to know *what* consequences of *what* acts entail liability. The line which separates conduct (act) from consequences is an arbitrary line and can be put wherever one finds it most con-

* Professor of Law, Indiana University Law School. Editor, Indiana Law Journal. M.A., Iowa; S.J.D., Michigan. Author of articles in various legal periodicals.—*Ed.*

¹ Winfield, "The Myth of Absolute Liability," 42 L. Q. REV. 37 (1926).

venient to put it. For certain purposes the common law put it at the point which divided actions in trespass from actions on the case. In trespass, the injury had to be "part of the act", in case the injury was a "consequence" only. Just as we do find it convenient to divide the flux of experience into causes and effects in order to make them easier to treat, we have found it desirable in the law to treat human experiences as composed of the two elements — human conduct and its consequences. As Mr. Justice Holmes says, a person is really liable even in trespass for the consequences of his conduct.² But it is no less true that he is liable for his conduct. Now since the line drawn between the two is arbitrary and conventional, there is some choice as to precisely where this line shall be drawn in stating principles of liability. The choice should be determined solely by considerations of intelligibility and logical coherence of statement. Under such circumstances we should expect to find some difference of opinion for the reason, if for no other, that several methods of statement may be equally intelligible and equally true. What Poincaré finds true of physical phenomena is certainly true of legal — that where there is one explanation for a thing there are an infinite number of explanations.³ At least, we find there is more than one.

Perhaps the best instance of this is the three methods of stating the legal principles which control liability for negligence. These three methods indicate how liability may be expressed in terms of the character of the conduct and the character of the consequences with varying degrees of emphasis upon the one or upon the other. These three methods may be identified with three familiar names, not because the methods represent exactly the techniques of these three persons but because in a general way they do represent their tendencies to analyze liability and state results by placing different degrees of emphasis respectively upon conduct and consequences. The three methods may also be identified for the purpose of making the comparison clearer with three well known cases in the law of torts. The first method is the one which we may, for convenience, associate with the name of Judge Andrews,⁴ and which is fairly well illustrated by the well known case of *Hoag v. Lake Shore R. R.*⁵ According to the analysis here employed, the conduct upon which liability is based need only be

² HOLMES, THE COMMON LAW 91 (1881).

³ FOUNDATIONS OF SCIENCE 120 (1913).

⁴ Dissenting in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928).

⁵ 85 Pa. St. 293, 27 Am. Rep. 653 (1877).

such as involves unreasonable risk of some foreseeable harms to some persons. Neither the harms threatened nor the persons threatened are referred to particularly or even generally. Defendant's conduct is sufficiently culpable to become the basis of liability if it can be characterized as "negligence in the air." Given this type of conduct, the problem becomes one of determining what consequences defendant is liable for. According to this technique the defendant is liable for consequences (1) which are of the general class of harms which make his conduct negligent, (2) if the person injured is of the general class of persons who are threatened by the defendant's abstract negligence, and (3) if the harm is brought about in a way as is not unjust to hold defendant liable therefor. A somewhat elaborate set of rules has been worked out to determine whether or not the injury in a particular case is such a consequence as to satisfy the last of these three requirements. Beyond somewhat vague applications of the foreseeability test nothing has been formulated to assist with the first two requirements.

The second method of analysis is one which may be associated with the name of Professor Bohlen⁶ and which is illustrated by the case of *In re Polemis and Furness, etc., Co.*⁷ According to this method of stating the law, conduct which is the basis of liability must be such that it creates unreasonable risks of a general type to persons of a general class. Given this type of conduct on the part of defendant, he is liable for all consequences which occur in such a way that it is not unjust to hold him liable therefor. It will be noted that according to this method two of the considerations which, according to Judge Andrews' manner of statement, determine the character of the consequences for which one is liable are now employed to determine the character of the conduct for which one is liable. In other words, whereas Judge Andrews stated that one who created any kind of unreasonable risk of injury to anybody was liable for all consequences which were injuries of a general class to a general class of persons if they occur in a certain manner, Professor Bohlen states that a person to be negligent must create risks of a certain general class of harms to a general class of persons and if he is thus negligent, he is liable for all consequences which occur according to a certain sequence. Professor

⁶ "The Probable or the Natural Consequences as the Test of Liability in Negligence," 40 AM. L. REG. (N. S.) 79, 148 (1901), STUDIES IN THE LAW OF TORTS I (1926). The technique ascribed to Professor Bohlen has also been employed by Mr. Beven in his admirable work on NEGLIGENCE.

⁷ [1921] 3 K. B. 560.

Bohlen has thus emphasized somewhat more the character of the conduct at the expense of the character of the consequences. He has, however, recognized the same general factors as significant as were so recognized by Judge Andrews; the difference in the two systems being largely one of the form of statement.

The third method of statement is that employed by Dean Green⁸ and illustrated by the case of *Palsgraf v. Long Island R. R. Co.*⁹ The technique here is to state the principles of liability for negligence by placing practically all the emphasis upon the character of defendant's conduct. To be liable, a defendant must create a risk (1) of a general type, (2) to a general class of persons, (3) which is possible of consummation in a way such that it will not be unjust to hold defendant liable therefor. One who is negligent according to this formula is liable for all consequences actually ensuing from his conduct. It is to be noticed that Dean Green has here taken all three of the major considerations of policy which Judge Andrews employed to determine the character of the consequences for which a defendant would be liable, and has used them to determine the character of the conduct for which the defendant is liable. Again the difference is merely one of statement of the law as found in the cases. All the cases which Judge Andrews can present intelligibly according to his formula, Dean Green and Professor Bohlen can state quite intelligibly according to theirs. It may be that some one of these three methods makes it a little easier to state the law or makes it a little more intelligible when stated. From a rational point of view, each method of statement is at least a possible one and whatever choice there may be between them must be based upon the ease with which one or the other characterizes the decided cases. One person will like one manner of statement better than another; but it is important to realize that substantially the same policy factors are being recognized and that the difference is one of formulation.

In the area of tort law where we talk of liability without fault, it appears that the results of the decisions can also be readily stated according to the three schemes just outlined for stating the law of negligence — namely, in terms of (a) the general type of risk created,

⁸ THE RATIONALE OF PROXIMATE CAUSE (1927).

⁹ 248 N. Y. 339 (1928). The *Palsgraf* case is not a pat case to illustrate Dean Green's technique. It may very well be that Chief Judge Cardozo was thinking in terms of the second method of analysis — that one attributed to Professor Bohlen. The writer has found no case in which the court has unequivocally employed the Green analysis. The *Palsgraf* case comes as close to this technique as any case available.

(b) the general class of persons threatened and (c) the manner in which the harm occurs, that is, the sequence of events involved.

II

FACTORS IN "ABSOLUTE" LIABILITY

Dean Thayer¹⁰ pointed out the error in the popular assumption that the rule of *Rylands v. Fletcher* makes the defendant liable for all consequences in fact resulting from his conduct. This is precisely what the rule of the case does *not* do; it makes defendant liable, as will appear shortly, only for proximate consequences, not for remote consequences. Dean Thayer seems to have thought, however, that this was due to subsequent limitations of the rule imposed by later cases and that the rule, as originally enunciated, included liability for remote as well as proximate damage. We cannot agree that this was the real state of the matter. In enunciating the celebrated judgment in the Court of Exchequer Chamber,¹¹ Blackburn, J., suggested, it may be remembered, some of the limitations of liability. A man who collected dangerous substances on his land was liable, he said, for the damage which was the "natural" consequence of their escape. The meaning to be ascribed to the adjective "natural" is to be ascertained in the light of the statement which the judge made immediately thereafter. He pointed out that he thought a defendant could absolve himself from liability by showing that the escape was due to an act of God or *vis major*. This looks remarkably like some of the limitations imposed by the rules governing proximate causation. Moreover, although Dean Thayer conceived of liability under *Rylands v. Fletcher* as extending properly to proximate consequences only, he thought that there was no such limitation to liability under other heads of liability without fault, as, to use his examples, workmen's compensation statutes and liability for keeping dangerous animals. On the contrary, it will appear in what follows that the same limitation (stated here in terms of causal connection) applies equally under all principles of strict liability.

As a starting point we may formulate an hypothesis which covers most of the cases of liability without fault. This may be done in such broad terms that no one will take exception thereto: some types of

¹⁰ In an article written shortly before his death, "Liability Without Fault," HARV. L. REV. 801 (1916), SELECTED ESSAYS ON THE LAW OF TORTS 599 (1924).

¹¹ L. R. 1 Ex. 265 (1866).

conduct create such risks of harms to others, even when the conduct itself is careful, that, though the creation of the risks is not itself unreasonable because of the social utility of the conduct, nevertheless it is unreasonable for the person injured to bear his own loss. We may state the rules of strict liability, then, in answer to the parts of the following general questions: (1) what types of conduct lawful in themselves are so hazardous (2) to certain classes of persons (3) that the actor must assume some risks of the consequences to those persons?

1. *The General Class of Harms Threatened*

The answer to the first part of our question may be given in terms of the various type-fact situations which we call nuisance — keeping wild or vicious animals, keeping domestic animals, collecting large quantities of dangerous substances on one's land, maintaining fires, etc., which have gradually become the conduct-basis of liability without fault. If the actor has engaged in such conduct, it is submitted that he is liable for all consequences which satisfy the other requirements of our proposed formula. But one who engages in extra-hazardous conduct is liable only for those consequences which belong to the general class of harms threatened by his conduct. Thus, though the defendant keeps a wild animal that is vicious by nature, he is not liable for injuries produced by a horse becoming frightened and running away at the sight of the animal on the road.¹² Such a harm is not one of the general classes of harms which make his conduct extra-hazardous. It is not a result of the animal's vicious disposition. A similar result is reached where the defendant accumulates quantities of electricity on his land in dangerous amounts. He is not liable for consequences which were outside the general class of harms which make his conduct dangerous, such as injury to the *plaintiff's* electrical equipment.¹³ The policy of the law does not impose the rule of strict liability to protect against harms incident to the plaintiff's extraordinary and unusual uses of land. The same is true where the defendant's conduct is charged to be a nuisance because of excessive heat produced by the defendant's manufacturing process, where the plaintiff's injury consists of damage to a very delicate type of paper which he is keeping for sale on his premises.¹⁴ The injury is not one of the general class, the risk of which makes defendant's conduct a nuisance.

¹² *Scribner v. Kelly*, 38 Barb. (N. Y.) 14 (1862).

¹³ *Eastern & S. African Tel. Co. v. Cape Town Tramways* [1902] A. C. 381.

¹⁴ *Robinson v. Kilvert*, 41 Ch. D. 88 (1889).

The same principles govern the liability for injuries by domestic animals known to have vicious tendencies. The general risk which is the basis of liability is what may be reasonably expected from such viciousness, and no other harms. Thus, keeping an animal known to attack other animals but never known to attack human beings is insufficient to hold the owner for the latter type of harm.¹⁵ The keeper of such an animal is liable only for the general type of harm which makes his conduct extra-hazardous, that is, that type of injury which he knew or had noticed that the animal had a propensity to commit.¹⁶

A similar limitation is to be found in the law relating to trespassing animals. The owner is held liable because of a very definite general class of risks in the keeping of cattle, viz., their escape, wanderings and trespasses and damage incident thereto. Thus, even though a defendant is liable for the trespass of his domestic animals, he is not liable at all for injuries to the person alone, as such is not the type of harm which makes the keeping of the animal extra-hazardous. "For this reason," says Judge Cooley,¹⁷ "the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him." In *Hadwell v. Righton*¹⁸ a fowl belonging to the defendant escaped on to the road, became frightened at a dog and flew into the wheels of a passing cyclist. The owner was held not liable for personal injuries to the rider, although the court thought there might be liability if it were shown that fowls were liable to fly at bicycle wheels. Similarly, in *Cox v. Burbidge*¹⁹ the owner was not liable for the kicking of a person by his horse when it did not appear that the defendant knew his horse to be vicious. Furthermore, the principle under discussion limits the *measure* of damages. A plaintiff can recover, in addition to the damages for the trespass, other damage sustained, but he must show the damage to be a harm of the general class to be apprehended from the trespass. Thus, where the defendant's sheep trespassed in plaintiff's field and infected his sheep, the defendant was liable for the "consequential" damages.²⁰ "It appears to me," said the court, "to be the natural consequence of the trespass by the defendant's sheep that the plaintiff's

¹⁵ *Eightlinger v. Egan*, 65 Ill. 235 (1872); *Osborne v. Chocqueel* [1896] 2 Q. B. 109.

¹⁶ See *Klinberg v. Russell*, 125 Ind. 531, 25 N. E. 596 (1890).

¹⁷ 2 COOLEY ON TORTS, 3d ed., 692 (1906).

¹⁸ [1907] 2 K. B. 345.

¹⁹ 13 C. B. (N. S.) 430 (1863).

²⁰ *Theyer v. Purnell* [1918] 2 K. B. 333.

own sheep might contract scab from defendant's sheep." The same result was reached when the defendant's trespassing stallion bit the plaintiff's mare²¹ and where the defendant's worthless bull got the plaintiff's thoroughbred cow with calf.²² It is noteworthy that some of the commentators have actually explained these cases in the language of proximate causation as understood by Judge Andrews. Thus, Pollock observes:²³

"It is the nature of cattle and other live stock to stray if not kept in, and to do damage if they stray; and the owner is bound to keep them from straying on the land of others at his peril, though . . . the liability is only for natural and probable consequences, not for an unexpected event."

And Beven, in rationalizing a case in which the owner of a horse was held liable for personal injuries committed while it was trespassing, declares:²⁴

"When a horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given."

As a final illustration of the way in which strict liability is limited to the general class of harms that render the conduct extra-hazardous, we may refer to the cases denying liability for damage caused by blasting when the damage is produced by concussions of the atmosphere.²⁵ Those courts which deny liability are simply holding that such harms are not of the general class which makes defendant's conduct extra-hazardous. Courts which take a different view are extending the general class of consequences for which there is strict liability.

2. *The General Class of Persons Threatened*

The second factor in determining the scope of liability for extra-hazardous conduct — the determination of the general class of persons protected from the harms threatened by extra-hazardous conduct —

²¹ *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10 (1874).

²² *Crawford v. Williams*, 48 Iowa 247 (1878).

²³ *TORTS*, 13th ed., 514.

²⁴ 1 *NEGLIGENCE*, 4th ed., 86 (1928).

²⁵ See cases collected in Smith, "Liability for Blasting," 33 *HARV. L. REV.* 542, 667 (1920), *SELECTED ESSAYS ON THE LAW OF TORTS* 614 (1924).

offers little difficulty. The persons exposed to the risk are usually a rather definite class of persons, such as adjoining landowners, in the *Rylands v. Fletcher* situation, or persons in the neighborhood, in the case of nuisance. Two or three situations will serve to illustrate the workings of the principle. The case of keeping watchdogs is in point. It has been decided that trespassers,²⁶ and *a fortiori* licensees and invitees,²⁷ are within the protection of the rules of strict liability for keeping dangerous dogs; but persons guilty of a criminal trespass or a felony are not within the protection of the rule.²⁸ They do not belong to the general class of persons as to whom the risk of injury from the keeping of vicious dogs should be made a basis of liability.

Again, in the law of liability for physical invasions of property due to blasting, it has been decided by one court that there is no liability to persons whose premises are at a distance such that there is no reason to expect that they will be damaged by the blasting activities.²⁹

3. *The Manner in Which the Harm Occurs*

In the last place, even if the harm sustained by the plaintiff belongs to the general class of harms the risk of which makes the defendant's conduct extra-hazardous to the plaintiff or persons in a similar position, it must have occurred in a particular manner. The sequence of events must have been such that it is not unfair to hold the defendant liable therefor. Here we find the ordinary rules governing legal causation quite adequate to state the law. Thus, although accumulation of water is extra-hazardous because its escape involves a risk of serious damage to adjoining property holders, nevertheless the escape must occur in the ordinary course of nature, and if some superseding cause occasions the escape there is no liability. We have such a superseding cause where the escape is caused by the act of God or by a *vis major* which defendant is not bound as a reasonable man to anticipate.³⁰ Even the gnawing of a rat may be such an unexpected, independent cause as to make it unjust to hold defendant liable.³¹ So, also, if the escape of the water is brought about by the intervening wrongful act of a third

²⁶ *Sherfey v. Bartley*, 4 Sneed 58, 67 Am. Dec. 597 (1856).

²⁷ *Sylvester v. Maag*, 155 Pa. St. 225 (1893); *Conway v. Grant*, 88 Ga. 40, 13 S. E. 803 (1891).

²⁸ See *Woolf v. Chalker*, 31 Conn. 121 (1862) and *Loomis v. Terry*, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306 (1837).

²⁹ *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991 (1892).

³⁰ *Nichols v. Marsland*, L. R. 10 Ex. 255 (1875); L. R. 2 Ex. D. 1 (1876).

³¹ *Carstairs v. Taylor*, L. R. 6 Ex. 217 (1871).

person which was not foreseeable under the circumstances, the defendant is relieved from liability.³²

Liabilities under the Workmen's Compensation Statutes can be analyzed in much the same manner. The statutes provide that employers shall be made liable for injuries resulting from accidents "arising out of and in the course of the employment." The courts hold not only that the injury complained of must be a general class of harms which the statute was designed to govern and must relate to employees — the class of persons for whose exclusive benefit the law was passed — but they also require that the injury must be brought about in a manner so that it is not unjust to hold the defendant responsible therefor. There is, of course, no difficulty as to the class of persons to be protected. The statutes were passed for the exclusive benefit of employees and apply to them alone. Examples of the limitation thus imposed upon the application of the rule of strict liability are to be found in cases denying compensation when the workman is struck by lightning or injured by the interposition of some act of God,³³ and in cases where the injury is brought about by the independent acts of other employees or third persons and which are in no way connected with the duties of the employment. The "horse play" cases, of which there are a large number, are in point.³⁴ But if the "horse play" be carried on by an employee known by the employer to be addicted to such practice so that it becomes a "condition of the employment," then the injury is by accident "arising out of and in the course of employment."³⁵ Another example is the line of cases considering compensation for injuries occasioned by an assault of a fellow workman. If the altercation arises out of some disagreement pertaining to the work, the assault of the fellow workman does not prevent compensation,³⁶ but if it arises from some independent disagreement, the injury is not compensable.³⁷ This fits the proximate cause formula beautifully. It is not unexpected that men will quarrel over their work. But it is hardly foreseeable that independent and collateral matters will precipitate an assault by one employee upon another. In many of these cases, the courts employ the exact language of the proximate cause

³² *Box v. Jubb*, 4 Ex. D. 76 (1879); *Rickards v. Lothian* [1913] A. C. 263.

³³ *Deckard v. Trustees of Indiana University* (Ind. 1930) 172 N. E. 547, noted in 6 IND. L. J. 194 (1931). See 26 MICH. L. REV. 307 (1928).

³⁴ *Lee's Case*, 240 Mass. 473, 134 N. E. 268 (1922).

³⁵ *In re Loper*, 65 Ind. App. 571, 118 N. E. 324 (1917).

³⁶ *Pekin Cooperage Co. v. Industrial Comm.*, 285 Ill. 31, 120 N. E. 530 (1918).

³⁷ *Armitage v. Lancashire & Yorkshire Ry.*, 86 L. T. 883 (1902).

cases, with the exception of the label.³⁸ In short, the courts have interpreted the phrase "accident arising out of and in the course of the employment" to be equivalent to an "accident proximately caused by the employment."

In the cases allowing a recovery for injuries caused by keeping vicious animals, it appears that the injuries always occur in a manner or sequence of events that brings them within the orthodox rules of proximate causation. Where a recovery is sought for injuries due to an attack by a vicious dog, the owner is liable even if there is an intervening cause if it was to be expected, as, for example, where defendant's dog bit the plaintiff not by reason of its vicious character but because it was rabid,³⁹ or because of its playfulness.⁴⁰ In each of these cases defendant indulges in the type of conduct which is the basis of liability, in knowingly keeping a dangerous brute; plaintiff sustains an injury of a general type which makes the keeping of the animal extra-hazardous; and, while the particular injury arises in an unusual manner, nevertheless it is known that a vicious dog may injure persons even in play, and vicious dogs as well as gentle dogs will sometimes go mad. Again, where defendant keeps a dangerous animal and the same is teased and infuriated by third persons,⁴¹ or where it is released by a third party,⁴² the act of the third party is not so extraordinary and unexpectable that the defendant's conduct is not the proximate cause of the injury. The case is even easier here, for the possible careless action of others is one of the risks which makes the keeping of dogs extra-hazardous. It is quite analogous to the negligence case in which the defendant's motorman leaves his street car unguarded on a steep decline and a negligent passenger releases the brake. It is quite properly held that defendant's negligence is the proximate cause of the injury to the plaintiff since the act of the passenger is one of the very risks which makes the defendant's conduct unreasonable.⁴³

The same limitations are to be found where defendant has kept domestic animals. The rule of strict liability makes him liable for

³⁸ See *DeFilippis v. Falkenberg*, 155 N. Y. S. 761 (1915) and *Pekin Cooperage Co. v. Industrial Comm.*, 285 Ill. 31, 120 N. E. 530 (1918).

³⁹ *Clinkenbeard v. Reinert* (Mo. 1920) 225 S. W. 667, noted in 34 HARV. L. REV. 770 (1921).

⁴⁰ *Oakes v. Spalding*, 40 Vt. 347 (1867).

⁴¹ *Vredenburg v. Behan*, 33 La. Ann. 627 (1881).

⁴² *Baker v. Snell* [1908] 2 K. B. 352, 825.

⁴³ *Kleibenstein v. Iowa Ry. & Light Co.*, 193 Iowa 892, 188 N. W. 129 (1922).

trespasses but it is to be noted that the trespass must be a proximate consequence of the *escape* of the domestic animal or the owner of the animal will not be liable therefor. Thus, where an intermeddling stranger drives the defendant's cattle on plaintiff's land, the defendant is not liable, the damage having been caused by the unforeseeable independent act of a stranger.⁴⁴ But where the stranger by a wrongful act releases the defendant's cattle which afterward wander onto the plaintiff's land, the defendant is liable, for the trespass here is sufficiently connected with the reason for the rule of strict liability as to properly come within its scope.⁴⁵ That is, the trespass is the proximate consequence of the escape and properly attributable to the wandering propensities of domestic animals.

In the case of liability for damage done by the escape of fire, it was recognized in the early law that the manner in which the risk was consummated might affect liability. As early as 1697, in *Tubervil v. Stamp*,⁴⁶ it was admitted that "if a sudden storm had arisen which he (defendant) could not stop, it was matter of evidence and he should have showed it." Here, certainly, is a suggestion that some consequences of maintaining fires are brought about by an extraordinary sequence of events so that it would be unfair to hold defendant liable therefor. Accordingly, it is not surprising to find that the modern decisions, in those relatively few situations in which there is strict liability for escape of fire, do rely upon the orthodox proximate cause apparatus to limit the scope of liability. In a recent case,⁴⁷ plaintiff sued a railroad company under a statute imposing liability regardless of fault or negligence for fires caused by the operation of the railroad. Plaintiff's employee had removed the cover of the dome of plaintiff's car of gasoline standing on a siding. The employee, though using due diligence, was unable to replace the lid before the defendant's locomotive passed at a distance of about 500 feet. The fire from the engine's fire box ignited the fumes and vapor of the gasoline and destroyed two cars of gasoline and a car of oil. It was held that defendant was not liable. "It clearly appears," reasoned the court, "that the proximate cause of the fire in question was the act of the agent of the Oil Company in removing the cap from the dome of the tank car. . . . The fire was not caused by the operation of the railroad within the meaning" of the statute.

⁴⁴ *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377 (1874).

⁴⁵ *Noys v. Colby*, 30 N. H. 143 (1855).

⁴⁶ 1 Salk. 13 (1691).

⁴⁷ *Davis v. Atlas Assurance Co.*, 112 Ohio St. 543, 147 N. E. 913 (1925).

III

DOCTRINAL STATEMENT OF THE LAW OF STRICT LIABILITY

Current statements of the law of strict liability are extraordinarily unsatisfactory. The paucity of scientific exposition of the law in this field has made it so difficult to comprehend the appropriate scope of the principles of liability involved that courts are frequently at a loss adequately to rationalize their judgments.⁴⁸ This inadequacy of exposition is so marked that as ingenious a scholar as Salmond is forced to state the rule of *Rylands v. Fletcher* in a somewhat generalized way and then set forth a long list of "exceptions" to the generalizations.⁴⁹ This, it must be admitted, is unsatisfactory and makes it difficult to grasp the true scope of the principle of liability. If we abandon this manner of stating the law, and make an effort to synthesize the cases and assimilate them to well understood dogmas, we are faced with a choice of methods of statement analogous to the choice of three methods described above for the statement of the law of negligence.

Now it is submitted that a method analogous to the techniques employed by Dean Green and Professor Bohlen in their statements of the law of negligence is not at all suitable for the statement of the law of strict liability. The reason of this unsuitability seems to lie in the fact that they have exploited the duty concept in a manner which will not work here. Negligence is regarded as a breach of a duty to use appropriate care. Accordingly the problems at once arise to whom is the duty owed and what is its extent. Thus Professor Bohlen speaks of a duty to use due care, owed to this person or that person but not to some other person;⁵⁰ and Dean Green speaks of a duty which comprehends this risk or that risk consummated in such and such a manner, but which does not comprehend some other risk.⁵¹ Both forms of statement involve the notion of a duty which is owed to particular persons and which is definitely limited in scope. But the duty concept is of value only where defendant is morally culpable, because duty is primarily a moral concept. It is so shot through with moral connotations that it actually misdescribes the character of the defendant's

⁴⁸ A striking instance of this is the recent California case of *Green v. General Petroleum Corporation* (Cal. 1931) 270 Pac. 952.

⁴⁹ SALMOND, *TORTS*, 7th ed., ch. ix (1923). Cf. POLLOCK, *TORTS*, 13th ed., 510 ff. (1929).

⁵⁰ See *RESTATEMENT OF THE LAW OF TORTS*, sec. 165 (1929).

⁵¹ See many instances in *RATIONALE OF PROXIMATE CAUSE* and Dean Green's various essays.

conduct in cases where there is no moral fault. There is a temptation to employ the notion of duty in all cases of legal liability; this temptation proceeds from the fact that the duty hypothesis presupposes a rule of conduct which existed prior to the acts complained of. It is consistent with our sense of fairness to enunciate rules of liability in terms of pre-existing duties which the parties may be supposed to have known and which they presumably might have complied with. This accounts for the fact that attempts are so commonly made to state every type of liability without fault in terms of *duty*, which, of course, implies fault. Thus, Bishop insisted that the rule of *Rylands v. Fletcher* was based on fault,⁵² Cooley thought that liability for keeping vicious animals was based on negligence,⁵³ Smith found fault to be the basis of liability for blasting,⁵⁴ and the American Law Institute now restates the law of trespass *quaere clausum fregit* largely in terms of fault.⁵⁵ Thayer thought that the law of negligence could now dispose of most cases without the use of "more eccentric doctrines."⁵⁶ But it is noteworthy that attempts to state many of the rules of strict liability in terms of duty do not meet with marked success. Observe, for example, the difficulties of the court in the case of *Baker v. Snell*;⁵⁷ the judicial opinions varied from the statement that it was a breach of duty to keep a vicious animal at all, to the statement that the breach of duty occurred when the animal inflicted the injury. In modern text books it is sometimes said that the duty owed by defendant is to prevent the injury at all costs.⁵⁸ But by hypothesis in cases of strict liability, the defendant could not prevent the injury by taking reasonable precautions. Hence, he owes a duty not to indulge in the conduct at all or to perform the impossible. It is not very intelligible to state the law in terms of duties which it is impossible to perform.

Thus, the duty concept is inappropriate to characterize the strict liability cases. With the duty notion must go the possibility of a practical application of either Dean Green's or Professor Bohlen's technique for stating the law. If defendant has indulged in extra-

⁵² BISHOP, NON-CONTRACT LAW 385, note 3.

⁵³ 2 COOLEY ON TORTS, 3d ed., ch. xi (1906).

⁵⁴ "Liability for Substantial Physical Damage to Land by Blasting," 33 HARV. L. REV. 542, 667 (1920), SELECTED ESSAYS ON THE LAW OF TORTS 614 (1924).

⁵⁵ See RESTATEMENT OF THE LAW OF TORTS, tentative draft, No. 7, c. 1 (1931).

⁵⁶ Thayer, "Liability without Fault," 29 HARV. L. REV. 801 (1916), SELECTED ESSAYS ON THE LAW OF TORTS, 599 (1924).

⁵⁷ [1908] 2 K. B. 825.

⁵⁸ SALMOND, TORTS, 7th ed., 344 (1923); POLLOCK, TORTS, 13th ed., 500 ff. (1929).

hazardous conduct at all, he has engaged in conduct which may be the basis for legal liability. It is awkward to say that he has indulged in conduct which is the basis for liability to some persons for some general classes of injuries but not to other persons for other types of harms. It is much more intelligible to state that the defendant has engaged in a type of conduct which is a sufficient basis of liability, and then determine what consequences of such conduct he is liable for. By this method the three considerations of policy which Judge Andrews employed to determine the character of the consequences of defendant's negligence may here be employed in the same manner. If one does not like the term "proximate consequence" one need not use it. It would seem, however, that all the dogmas which until the last twenty-five years determined whether consequences of "negligence in the air" were proximate are appropriate for determining whether consequences of extra-hazardous conduct entail liability.